

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION**

ONE STOP FOOD & LIQUOR, INC.
Employer

13-RM-1731

and

**LOCAL 881 UNITED FOOD AND COMMERCIAL
WORKERS UNION**
Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on January 7, 2004 before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board to determine whether the petition should continue to be processed.¹

I. BACKGROUND

The One Stop Food & Liquor, Inc. (hereafter the “Employer”) and Local 881 United Food and Commercial Workers Union (hereafter the “Union”) are parties to a collective bargaining agreement with effective dates of March 11, 2001 through March 7, 2004. On September 22, 2003, the Union filed unfair labor practices against the Employer in Case 13-CA-41343, alleging, *inter alia*, that the Employer failed to apply the contract to all unit employees. Case 13-CA-41343 was dismissed by the Region on October 29, 2003, based,

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

inter alia, on a determination that the agreement between the Union and the Employer was a “members- only” agreement. The Union appealed the the dismissal of Case 13-CA-41343, and while the Union’s appeal was pending the Employer filed the instant petition on December 24, 2003. Since the date of the hearing, on February 27, 2004, the Office of Appeals denied the Union’s appeal of Case 13-CA-41343.

II. ISSUE

The Union argues that the instant petition should be dismissed because it is the incumbent representative of the Employer employees and the Employer has not demonstrated sufficient employee disaffection the Union to maintain an RM petition pursuant to the Board’s standard in *Levitz Furniture Co. of the Pacific*, 333 NLRB, 717 (2001). Alternatively, the Union argued at the hearing that the Regional Director should hold the petition in abeyance pending the outcome of its appeal of the Region’s determination to dismiss Case No. 13-CA-41343. The Employer, at the hearing, asserted that the Region should continue to process the instant petition without delay. First, the Employer argued that the petition complied fully with the prerequisites announced in *Levitz Furniture* for obtaining an RM election. Secondly, the Employer asserted that there is no contract bar to the instant petition because the Region determined in Case 13-CA-41343 that the current collective bargaining agreement entered into by the parties is an unenforceable members only agreement.

III. DECISION

For the reasons discussed in detail below, I find that the instant Petition should be processed by the Region. Based on this finding,

IT IS HEREBY ORDERED that an election in the bargaining unit described below be conducted under the direction of the undersigned at a time and place to be set forth in a subsequently issued notice of election:

All full-time and regular part-time retail store employees employed by the Employer at its facility currently located at 4301 South Lake Park, Chicago, Illinois; but excluding all office personnel, meat department employees, employees working in the warehouse/cooler backroom who do not work within the store, security personnel, other employees who are not in the direct employ of the Company, and guards, professional employees and supervisors as defined in the Act.²

² The unit description appears as stipulated by the Parties in the record.

IV. ANALYSIS:

Inasmuch as the processing of the instant petition was held in abeyance pending the outcome of the Union's appeal of the dismissal of Case 13-CA-41343, and that appeal was denied, the issue of whether the processing of the petition should be held in abeyance due to the pendency of unfair labor practice charges is moot³.

Next, I address the Union's assertion that dismissal of the petition is appropriate here where the Employer has not made a showing of employee disaffection as required under *Levitz Furniture*, supra and the Employer's counter argument that it fully complied with the prerequisites to filing an RM petition under *Levitz Furniture*. *Levitz Furniture* mandates that in order for an employer to obtain an RM election, the employer must demonstrate reasonable good-faith uncertainty as to the incumbent union's continued majority status. 333 NLRB at 723. The Board further instructs that in RM cases, **the regional offices** should determine whether good-faith uncertainty exists on the basis of evidence that is objective and that reliably indicates employee opposition to incumbent unions. *Id.* at 729. (Emphasis added). The *Board's Casehandling Manual, Part Two, Representation Proceedings*, Section 11021, makes it clear that this determination is a "purely administrative matter" and that "no party has a right to litigate the subject, either directly or collaterally." The Region has administratively determined the Employer has demonstrated a reasonable good-faith uncertainty as the Union's majority status in the petitioned for unit, and the Region's administrative determination is not properly the subject of this proceeding.

Finally, I address the question whether the collective bargaining agreement entered into by the parties constitutes a contract bar to the instant petition. It has long been established that a contract for "members only" does not operate as a bar to a representation petition. See *Appalachian Shale Products Co.*, 121 NLRB 1160, 1164 (1958). I find, based on the Region's determination in Case 13-CA-41343, that the collective bargaining agreement entered into by the parties, with an expiration date of March 7, 2004, is a members-only agreement that does not constitute a contract bar to processing the instant petition.

V. SUM

As I have found no bar to processing the petition and as the parties have raised no other issues that I have directed the election for the petitioned for unit as stipulated by the parties.

³ With regard to Union's argument that the Petition be dismissed by virtue of *NDK Corp.*, 278 NLRB 1035 (1986), that case was relevant only to the issue of the merits of its unfair labor practice charges in Case 13-CA-41343. As Case 13-CA-41343 was dismissed and the dismissal upheld on appeal, the Union's arguments based on *NDK Corp.* have no further relevancy in this proceeding.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local 881 United Food & Commercial Workers Union.

VII. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior*

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois 60606 on or before **March 26, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **April 2, 2004**.

DATED at Chicago, Illinois this 19th day of March, 2004.

/s/ Harvey A. Roth,
Harvey A. Roth, Acting Regional Director
National Labor Relations Board
Region Thirteen
200 West Adams Street, Suite 800
Chicago, Illinois 60606

347-6020-5075

CATS-Nolss